

THE HONORABLE THOMAS S. ZILLY

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

Cause No. 2:21-cv-0811 TSZ

BUNGIE, INC., a Delaware corporation,

Plaintiff

v.

AIMJUNKIES.COM, a business of unknown
classification; PHOENIX DIGITAL GROUP
LLC, an Arizona limited liability company;
JEFFREY CONWAY, an individual; DAVID
SCHAEFER, an individual; JORDAN GREEN,
an individual; and JAMES MAY, an individual,

Defendants.

**DEFENDANTS' SURREPLY IN
OPPOSITION TO
PLAINTIFF'S MOTION FOR
DISCOVERY SANCTIONS
AND TO COMPEL
DISCOVERY RESPONSES**

**Note on Motion Calendar:
April 14, 2023**

Oral Argument Requested

Defendants, pursuant to Local Rule LCR 7(g) hereby request that Bungie Inc.'s belated and ineffective "Civil Rule 37 Certification" appearing at page 7 of Bungie's "REPLY IN SUPPORT OF ITS MOTION FOR DISCOVERY SANCTIONS AND TO COMPEL DISCOVERY RESPONSES" (Dkt # 109). In support of this request, Defendants state as follows:

1. Bungie's supposed "Civil Rule 37 Certification" appears for the very first time in its Reply brief filed April 14, 2023, not in its initial Motion as required by Rule LCR 37(a) (1). The requirements of LCR 37(g) are clear and direct (i.e., "Any motion for an order compelling disclosure or discovery must include a certification...."). The Rule simply does

1 not provide that the certification can appear in a Reply brief and not in the “motion” as
2 required by the plain language of the Rule.

3 2. More substantively, the belated “Certification” Bungie now supplies addresses
4 conferences held by the parties’ counsel on August 24, 2022 and November 11, 2022, nine
5 and five months ago respectively. Following each of these conferences, Defendants’
6 undersigned counsel agreed to, *and did*, serve supplemental discovery responses either
7 confirming the absence of responsive documents or providing supplementation. At no point
8 subsequent to either conference did Bungie contest the responses or request further
9 communications. Indeed, despite Bungie’s clearly stated threats to file discovery motions in
10 this case, Bungie never did so following these conferences as it is believed Defendants were
11 able to resolve all issues without court involvement.

12 3. The discovery issues Bungie addresses in its instant motion (Dkt #100) arose
13 for the first time well after either of the two prior conferences Bungie now claims, both
14 belatedly and incorrectly, satisfy the requirements of LCR 37(a)(1). None of these issues,
15 which relate to events far removed from either August or November of 2022, were, or even
16 could have been, discussed in the two conferences from last year. Importantly and tellingly,
17 Bungie made absolutely no effort whatsoever to “meet and confer” regarding the issues raised
18 in its instant motion before filing its motion. Again, it appears Bungie was far more interested
19 in getting a motion filed by this Court’s deadline than in actually complying with this Court’s
20 rules.

21 4. Had Bungie complied with LCR 37(a)(1) and discussed the issues with
22 Defendants’ counsel, it is likely that these matters could adequately been addressed without
23 the need for intervention by this Court and without the needless waste of resources and
24 incurring of needless legal fees necessitated by Bungie’s hasty and improperly filed motion.

25 5. Because Bungie’s retroactive and ineffective attempt to comply with LCR
26 37(a)(1) flouts the clear language of the Rule, and, more importantly does not comply with the
27 substance of the Rule, the “Civil Rule 37 Certification” appearing at page 7 of Bungie’s Reply
28

1 should be stricken, and Bungie's Motion to Compel Discovery should be denied for blatant
2 failure to comply with the clear directives of LCR 37(a)(1).

3 Such action by this Court is respectfully requested.

4 Dated April 17, 2023.

5 /s/ Philip P. Mann

6 Philip P. Mann, WSBA No: 28860

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I certify that this memorandum contains 450 words, in compliance with the
Local Civil Rules.